

Preface

This book began with the reflection that theories of human rights, or of rights more generally, as we have taught them and been taught them for years, labour under the weight of various dichotomies. These theories have developed various polar oppositions that were meant to bring clarity, but have more often brought confusion. In fact, these various dichotomies have been typically honoured by rejection rather than by their strict observance.

All students and teachers of human rights know many such distinctions, and several of our early discussions about this volume were addressed to reducing the list to the most meaningful or the most pervasive of them. These included:

1. *Legal rights and moral rights.* It is sometimes thought that moral rights are merely expressions of a vague wish that a particular claim should be legally enforceable (that they are, to use Dworkin's term, only 'background' rights¹), while 'real' rights are legal, in the sense that they give individuals strong and effectively enforceable institutional claims against their state or against some other states or against other individuals.
2. *Negative rights and positive rights.* This is a distinction that has been a preferred target of attack by more ambitious theorists of rights. In its canonical formulation, the distinction is meant to be between those rights that can be respected simply by non-interference with a person's sphere of autonomy and those rights that require, for their fulfilment, a 'positive' action, such as spending material resources, to implement them.
3. *Rights as universal,* which belong to all individuals as a consequence of no more than their membership of the human species, have been opposed to rights that are context-dependent or particular insofar as they make sense only when certain non-generalizable background conditions are met.

¹ See Ronald Dworkin, *Taking Rights Seriously* (New Impression with a Reply to Critics, Duckworth 1978) 93.

4. *Rights as primarily counter-majoritarian*, as constraints upon the scope of collective action, have been set against rights as both political and democratic, in that they demand individual participation in collective self-determination.
5. *Group rights and individual rights*. This is a distinction between those rights that belong to a group or to an individual merely by virtue of her group-membership, and, on the other hand, those that belong to an individual regardless of her group-identity.

As this short and far from exhaustive list indicates, not only are many of these dichotomies questionable, in the sense that they draw distinctions without a difference, but also their meaning is often unclear, ambiguous or confused. Accordingly, we thought that a book centred upon such conventional dichotomies would serve a purpose, even if it would lead to most or all of these dichotomies being debunked. This indeed happened – as evidenced by most of the chapters in this volume. Tom Campbell and Kevin Walton discuss the first dichotomy, Thomas Pogge and Duncan Ivison consider the second, Neil Walker and Patrick Emerton examine the third, Jeremy Waldron and Euan MacDonald engage with the fourth, and Jacqueline Mowbray looks at the fifth. Susan Marks and David Kinley, meanwhile, explore two further supposed tensions: between human rights and capitalism, and between idealism and pragmatism about human rights.

But we also had another motive for this book. We thought that insufficient conversation was going on between legal philosophers and international lawyers about the meaning and the contours of human rights: not just about specific rights, such as various welfare rights or rights of refugees, but also about the concept of rights itself. We thought, in other words, that legal philosophers were not sufficiently aware of various discourses about rights that were taking place in international law – for instance, about an alleged human right to development and, in relation to it, the possible drawbacks of emphasizing human rights rather than economic considerations – and that, on the other hand, international lawyers were rarely benefiting from advances in philosophical theories of rights.

This, in our opinion, is regrettable. In a deservedly influential book, *On Human Rights*, James Griffin distinguishes between the ‘bottom-up’ account and ‘top-down’ account of human rights² – and this distinction largely corresponds to preferred approaches by international lawyers and

² See James Griffin, *On Human Rights* (Oxford University Press 2008) 29.

philosophers, respectively. A top-down account starts with some overarching principles from which human rights can be derived. Bottom-up approaches start with human rights as used in our actual social life by politicians, lawyers, non-governmental organizations and social campaigners, and only then reflect upon the higher principles to which one must resort in order to explain their moral weight and their meaning, and to resolve conflicts between them.

We need both approaches, of course. We cannot take some canonical lists of human rights – as expressed, for example, in the Universal Declaration of Human Rights or the European Convention of Human Rights or the European Union Charter of Fundamental Rights or any national charters of rights – as being sufficient for a theory of rights. But, equally, we cannot abstract from actual international and domestic practices when philosophizing about human rights: our concepts must fit that practice sufficiently well to make our discussion pertinent to it. Finding a balance is a difficult matter. Charles Beitz's *The Idea of Human Rights*³ is one such admirable attempt to find a balance, even if some critics would say that it concedes too much to actual international practice.

There are many intersections between the concept of human rights and the practice of international law. For example, some would *define* human rights as the grounds for international intervention in a state that violates them; the very concept of human rights is, for them, derived from the moral appropriateness of overriding national sovereignty, which, for some time, was one of the quasi-sacred principles of international law. This capacity to trump national sovereignty is often seen as a defining feature of human rights. In his *Justice for Hedgehogs*, however, Ronald Dworkin considers and rejects this idea, as it seems to be setting an excessively high standard: some internationally recognized human rights, when violated, would not justify sanctions, never mind military force. We may, of course, in response to this observation, greatly restrict the category of human rights and confine them only to those whose violation is truly heinous or barbaric, but then we would depart from international usage, which has proved to be valuable in international and national practice.⁴

³ Charles R. Beitz, *The Idea of Human Rights* (Oxford University Press 2009).

⁴ See Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 333–34.

For their consideration of these issues, we are most grateful to the contributors to this book. We are also grateful to Samantha Naylor Brown and Adriana Edmeades for their wonderful assistance with the production of the final manuscript.

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